No. 50484-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

J.B. CRUZ,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 16-1-03678-5
The Honorable Edmund Murphy, Judge

OPENING BRIEF OF APPELLANT

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1. Did the trial court violate J.B. Cruz's constitutional right to a public trial by discussing a potential juror bias issue and peremptory challenge questions privately in chambers? (Assignment of Error 1)

2. Is a private in-chambers discussion regarding a potential juror bias issue and peremptory challenge questions a court closure that requires consideration of the Bone-Club criteria? (Assignment of Error 1)

3. Did the State fail to meet its constitutional burden of proving every essential element of the crime of second degree assault, when the testimony did not show that J.B. Cruz strangled the alleged victim? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged J.B. Cruz by Information with one count of second degree assault (RCW 9A.36.021), one count of interfering with the reporting of domestic violence (RCW 9A.36.150), and one count of unlawful imprisonment (RCW 9A.40.040). (CP 3-4) The State also alleged that the crimes were aggravated because they were domestic violence offenses and occurred within sight or sound of the victim's minor child (RCW 9.94A.535(3)). (CP 3-4)

The jury convicted Cruz of assault and unlawful imprisonment with the aggravator, and not guilty of interfering with reporting of domestic violence. (CP 44-49; RP 349-51) The trial court denied the State's request for an exceptional sentence, and imposed a standard range sentence of one year and one day. (RP 371-73, 376; CP 67) Cruz timely filed a Notice of Appeal. (CP 84)

B. SUBSTANTIVE FACTS

J.B. Cruz and Desiree Frieg met in January of 2015 and began dating. (RP 154, 157) At the time, Frieg lived with her baby daughter in an apartment in Puyallup. (RP 154, 155, 158) Cruz did not move in with Frieg and her daughter, but spent most of his time

with them and slept at the apartment. (RP 155-56)

In the evening of September 7, 2016, Cruz and Frieg had dinner together, put her daughter to bed, and began watching a movie in the bedroom. (RP 158-59) Everything was fine, until Frieg began texting with her daughter's father about an upcoming doctor's appointment. (RP 159-60) According to Frieg, Cruz demanded to know when she was going to tell him that she was texting with her ex, and Frieg told him it was "none of his business." (RP 160) This made Cruz angry, and they began arguing. (RP 161)

Frieg testified that she tried to get out of bed, but Cruz grabbed her in a choke hold and pulled her back. (RP 162) She testified that she started "freaking out" and crying, asking Cruz to stop. (RP 162, 163) The commotion woke her daughter, who was sleeping in the room, and she began crying too. (RP 162, 163, 164) Frieg testified that she was able to breathe, but that Cruz was holding her tightly. (RP 163)

Eventually Cruz released Frieg, but he stood in front of the bedroom door so Frieg was unable to leave. (RP 165) Frieg was upset, and she yelled at and slapped Cruz and asked to leave, but Cruz did not move. (RP 165, 179-80) Frieg told Cruz that she

wanted him to leave, so Cruz moved away from the doorway and began packing his belongings. (RP 180, 209)

Before Cruz could leave, Frieg demanded that he go to the drug store and buy her a “Plan B” contraceptive pill because she did not want to have a baby with Cruz. (RP 180, 209, 210) Cruz left the apartment. (RP 181-82) Frieg waited for him to return, and did not lock the apartment door or try to leave herself. (RP 181-82, 210, 212)

When Cruz returned about 10 minutes later with a pill, they argued again and Frieg decided to leave the apartment and go across the street to the fire station to seek help. (RP 182, 183-84, 212) Frieg gathered her daughter and left the apartment, and Cruz followed her in his car. (RP 186, 189)

The firefighters on duty that night heard the sound of a man and woman fighting outside. (RP 267, 277-78) They saw Frieg standing outside, crying and holding her daughter. (RP 268, 277-78) She told the firefighter that she had an argument with her boyfriend. (RP 268, 277-78) Two of the firefighters did not notice any visible marks or bruising, but one testified that he saw red marks on Frieg’s neck. (RP 269, 278, 282)

Frieg eventually went back to her apartment to wait for a

police officer to arrive. (RP 193) A Pierce County Deputy eventually arrived to take Frieg's statement. (RP 242, 246-47) Frieg seemed calm, but the Deputy could tell she had been crying. (RP 247, 248) The Deputy noticed redness and swelling on Frieg's neck, wrist and jaw. (RP 256-57; Exh. P5-17)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT VIOLATED CRUZ'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL BY DISCUSSING A POTENTIAL JUROR BIAS ISSUE AND PEREMPTORY CHALLENGE QUESTIONS PRIVATELY IN CHAMBERS.

In the middle of jury selection, the court called the parties into chambers twice for off-the-record conferences. (RP 118, 120, 168; CP 91) The first began at 1:56 PM and ended at 1:58 PM, and the second began at 2:23 PM and ended at 2:24 PM. (CP 91) Then the court completed the jury selection process and empaneled the jury, the parties gave opening statements, and the State's first witness testified. (RP 120-66; CP 91-92) At 4:02 PM, the court released the jury for the day and memorialized the in-chambers discussions for the record:

> The first one was, I had indicated Juror No. 4 had represented or acknowledged in the questioning that she knew Detective Moss, and there hadn't been any follow-up questioning about that. I asked if you wanted the Court to inquire in regards to that. The defense indicated that was not necessary, that it was

> a strategic decision on your part not to inquire any further about that. I didn't take any action.
>
> The second subject that we talked about were three of the jurors that had indicated a hardship that might fall within the time period of this trial. . . . All parties agreed to excuse [those] juror[s].
>
> The second time we went back is when the parties had exercised your peremptory challenges. I had filled out the chart indicating the 14 jurors I felt had been selected. I wanted to make sure that both counsel had the same numbers and the same order and, in fact, both of you did. We came back out and I seated the jury at that time. Those are the two occasions we stepped into chambers.

RP 168-70; CP 92) These in-chambers discussions constituted improper court closures and violated Cruz's right to a public trial.

A criminal defendant has a right to a public trial under both the United States Constitution and the Washington State Constitution. State v. Lormor, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); U.S. Const. amend. VI; Wash. Const. art. I, § 22. "The public trial right is found in two sections of the Washington Constitution: article I, section 22, which guarantees a criminal defendant a right to a 'public trial by an impartial jury,' and article I, section 10, which guarantees that '[j]ustice in all cases shall be administered openly.'" State v. Frawley, 181 Wn.2d 452, 458-59, 334 P.3d 1022 (2014) (plurality opinion) (alteration in original).

Whether a defendant's public trial right has been violated is

a question of law reviewed de novo. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (quoting State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)). To answer that question, the court engages in a three-part inquiry: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) if so, was the closure justified?" State v. Smith, 181 Wn.2d 508, 521, 334 P.3d 1049 (2014). (citing State v. Sublett, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

In this case, the second and third questions are easy to answer. The proceeding at issue in this case was certainly a "closure": the proceeding occurred in the judge's chambers, and that is a private and closed setting. State v. Whitlock, 188 Wn.2d 511, 520, 396 P.3d 310 (2017) (citing Frawley, 181 Wn.2d at 459-60 & n.8 (conducting trial court proceedings in-chambers so that the public is excluded constitutes a closure)). And the trial court did not conduct a Bone-Club analysis,[1] so the closure was not justified. Whitlock, 188 Wn.2d at 520-21 (and cases cited therein).

To determine whether the public trial right attaches to a particular proceeding, the court should apply the "experience and

[1] State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) requires a "weighing test consisting of five criteria" before a trial court may close a courtroom to the public.

logic" test. Smith, 181 Wn.2d at 511 (citing Sublett, 176 Wn.2d at 73). The court should consider whether the proceeding at issue has historically been open to the public, and whether public access plays a significant positive role in the functioning of the particular process in question. In re Det. of Morgan, 180 Wn.2d 312, 325-26, 330 P.3d 774 (2014) (citing Sublett, 176 Wn.2d at 73). The guiding principle is "'whether openness will "enhance[ ] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."'" Smith, 181 Wn.2d at 514-15 (alteration in original) (quoting Sublett, 176 Wn.2d at 75 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press* I))).

Though jury selection, and particularly voir dire, implicates the right to a public trial, the right is not necessarily implicated by preliminary excusals for statutory reasons (including hardship) based on juror questionnaires. State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); State v. Slert, 181 Wn.2d at 598, 605-06, 334 P.3d 1088 (2014).

For example, in State v. Russell, the trial judge, Russell, and the attorneys conducted a "work session" in the jury room where they reviewed the jurors' written questionnaires for potential

hardship issues. 183 Wn.2d 720, 724-27, 357 P.3d 38 (2015). The judge later announced all his excusal decisions in open court and stated that the excusals immediately following the work sessions were based on hardship. The Russell Court found no public trial right violation because "[p]roceedings like the work sessions here have not historically been open to the press or general public" and because "[n]o jurors were questioned during the work sessions … the purposes of discouraging perjury and encouraging witnesses to come forward would not be advanced." Russell, 183 Wn.2d at 731-32.

Later, in State v. Smith, the Court held that sidebars do not implicate the public trial right under the experience and logic test "because [sidebars] have not historically been open to the public and because allowing public access would play no positive role in the proceeding[s]." 181 Wn.2d at 511. The Court defined "[p]roper sidebars" as proceedings that "deal with the mundane issues implicating little public interest[,] ... done only to avoid disrupting the flow of trial, and ... either ... on the record or ... promptly memorialized in the record." Smith, 181 Wn.2d at 516 & n.10 (citing Wise, 176 Wn.2d at 5). The Court further held that the particular proceedings at issue in that case—all addressing legal

challenges and evidentiary rulings that were so devoted to legal "complexities" as to be "practically a foreign language"—were proper sidebars. Smith, 181 Wn.2d at 518-19.

More recently, in State v. Whitlock, the Court addressed whether a discussion about the proper extent of cross-examination of a confidential informant, which was conducted in chambers and which was not memorialized on the record until several hours after the discussion occurred, violated the right to an open courtroom and conflicted with Smith. 188 Wn.2d at 513-14.

The Whitlock Court first noted that, "under Smith, the in-chambers proceeding in this case was definitely not a sidebar" because it occurred in chambers, which is "by definition, closed to the public." 188 Wn.2d at 522. Second, the Court noted that "the in-chambers proceeding was not recorded or promptly memorialized" and this delay was unnecessary and unreasonable. 188 Wn.2d at 522-23. And finally, the Court noted that the objection argued in chambers "was not purely technical or legalistic," but rather concerned "a matter easily accessible to the public[.]" 188 Wn.2d at 523. Accordingly, the Whitlock Court found that the in-chambers proceeding was not a "[p]roper sidebar," that it implicated Whitlock's right to a public trial, and that it constituted a

structural error requiring reversal. 188 Wn.2d at 523-24.

Like Whitlock, the discussions in this case took place in chambers and were not memorialized in open court until several hours later. (CP 91-92; RP 118, 120, 168-70) Also like Whitlock but unlike Smith, the topics discussed were not legalistic but rather factual matters "easily accessible to the public." (RP 168-70) And unlike Russell, the discussion was not limited to juror hardship issues, but instead included discussions about a juror's potential bias and the exercise of peremptory challenges. (RP 168-70)

Experience and logic, and binding case law, tell us that the in-chambers discussions relating to jury selection certainly implicate the public trial right. The trial court's decision to hold these discussions in private, without any analysis of the Bone-Club factors, and its failure to immediately memorialize the content of the discussions on the record, violated Cruz's right to a public trial. This structural error requires reversal of Cruz's convictions. Whitlock 188 Wn.2d at 524.

B. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT CRUZ ACTUALLY STRANGLED OR INTENDED TO STRANGLE FRIEG.

The State's evidence did not establish all of the elements of the crime of second degree assault. "Due process requires that the

State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The State alleged that Cruz committed the crime of assault in the second degree by strangulation. (CP 3, 29) A person is guilty of that crime when that person intentionally "[a]ssaults another by strangulation." RCW 9A.36.021(1)(g). Strangulation is defined by statute as "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26). Accordingly, in order to convict Cruz of assault in the second degree by strangulation, the State was required to prove beyond a reasonable doubt that Cruz

intentionally assaulted Frieg and that Cruz either actually "obstruct[ed] [Frieg's] blood flow or ability to breathe" by compressing her neck or that Cruz compressed Frieg's neck with the specific intent to cause this result. RCW 9A.04.110(26); State v. Reed, 168 Wn. App. 553, 574-75, 278 P.3d 203 (2012).

Frieg testified that Cruz grabbed her around her neck and pulled her backwards when she tried to get out of bed. (RP 162) Cruz held Frieg tightly, but she could still breathe and talk. (RP 163) Accordingly, the State's evidence did not show that Cruz actually obstructed Frieg's blood flow or ability to breathe by compressing her neck. Frieg also testified that Cruz pulled her back onto the bed and held her, then released her but blocked the door so she could not exit the bedroom. (RP 162-63) It is not clear from this evidence that Cruz intended to strangle Frieg, as opposed to simply intending to restrain Frieg. Thus, Frieg's testimony does not establish beyond a reasonable doubt that Cruz actually strangled Frieg or intended to strangle Frieg.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hardesty, 129 Wn.2d 303, 309, 915

P.2d 1080 (1996); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Because the State failed to prove the essential element of "strangulation," this Court should reverse Cruz's assault conviction and dismiss the charge with prejudice.

V. CONCLUSION

The private in-chambers discussion regarding a potential juror bias issue and peremptory challenge questions violated Cruz's constitutional right to a public trial, and requires reversal of his convictions. The State also failed to meet its constitutional burden of proving every essential element of the crime of second degree assault because the testimony did not show that J.B. Cruz actually strangled or intended to strangle Frieg, and Cruz's assault conviction should be reversed.

DATED: December 15, 2017

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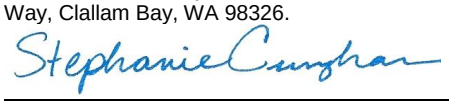
CERTIFICATE OF MAILING

I certify that on 12/15/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: J.B. Cruz, DOC# 399951, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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